

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.01.2017

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THE HONOURABLE MR.JUSTICE R.MAHADEVAN

Crl.O.P.No.26689 of 2016
and
Crl.MP.No.13399 of 2016

S.Vijayakumar

.. Petitioner

Vs

The State rep. By
the Inspector of Police,
Rasipuram Police Station,
Namakkal District.

.. Respondent

Petition filed under Section 482 of the Criminal Procedure Code, to call for the records relating to the impugned order passed in Cr.M.P.No.543 of 2016 in Special CC No.44 of 2015 dated 10.11.2016 on the file of the Sessions Judge, FTC, Namakkal and set aside the same by allowing the above Criminal Original Petition.

For Petitioner : Mr.K.A.Mariappan
For Respondent : Mr.C.Emalias, APP

ORDER

Challenging the order dated 10.11.2016 passed by the learned Sessions Judge, Fast Track Mahila Court, Namakkal in Cr.M.P.No.543/2016 in Special CC No.44 of 2015, the present Criminal Original Petition came to be filed.

2. The case of the petitioner is that a case in Crime No.166 of 2016 has been registered against the petitioner for the offences punishable under Sections 366(A) IPC and Section 5 (1) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter shortly referred to as 'POCSO Act'). Pursuant to the same, he was arrested and remanded to judicial custody. Subsequently, he was released on bail. After completion of investigation, charge sheet was filed before the learned Sessions Judge, (Fast Track, Mahila Court), Namakkal and the same was taken on file as Spl.CC No.44 of 2015. During

trial, P.W.1 to P.W.4 and P.W.5 and P.W.6 were examined in chief on 26.05.2016 and 26.09.2016 respectively. However, due to absence of the petitioner, the cross examination of those witnesses could not be done on the said dates. Hence, a petition in Cr.M.P.No.543 of 2016 came to be filed by the petitioner under Section 311 Cr.P.C to recall P.W.1 to P.W.6. However, by the impugned order dated 10.11.2016, the said petition was dismissed by the trial court on the ground that there was serious objection raised on the side of the prosecution. Aggrieved over the same, the petitioner is before this Court with the present petition for the above stated relief.

3. Learned counsel for the petitioner submitted that the petitioner is a lorry driver and is unable to get leave from his employer for attending every hearings, due to the same, he could not meet his counsel to get instructions, so as to cross examine P.W.1 to P.W.6 on the dates, when they were examined in chief. Therefore, the cross examination of those witnesses could not be done on the said dates. He further submitted that P.W.1 to P.W.6 are the members of one family, as such, in the event of the petitioner being permitted to recall them, he would complete the cross examination on a single day.

4. Per contra, learned Additional Public Prosecutor submitted that the petitioner was charged with the offences under Section 366(A) IPC and Section 5(1) r/w 6 of POCSO Act, which are serious in nature. Placing reliance on the decision of the Hon'ble Supreme Court reported in (2015) 3 SCC 220 (Vinod Kumar v. State of Punjab), he further submitted that the petition filed under Section 311 Cr.P.C by the petitioner is only to drag on the proceedings and the same has been rightly rejected by the trial court.

5. Heard both sides and perused the materials placed before this Court.

6. Admittedly, the petitioner has been implicated as accused for the offences punishable under Section 366(A) IPC and Section 5(1) r/w Section 6 of POCSO Act in Spl.CC No.44 of 2015, which is now at trial stage before the learned Sessions Judge, Fast Track Mahila Court, Namakkal. As the petitioner was unable to cross examine P.W.1 to P.W.4 and P.W.5 and PW.6 on 26.05.2016 and 26.09.2016 respectively due to his failure to meet his counsel on the hearing dates, he filed the petition under Section 311 Cr.P.C to recall those witnesses. However, the said petition was dismissed by the trial court on the ground that the prosecution has raised serious objection by stating that the

petitioner has failed to utilize the opportunity already given to him and he is purposely dragging on the proceedings.

7. According to the learned counsel for the petitioner, there is no undue delay, as alleged by the prosecution, whereas, the same is disputed by the learned Additional Public Prosecutor. In support of his objection, the learned Additional Public Prosecutor has relied on the judgment of the Hon'ble Supreme Court reported in (2015) 3 SCC 220 (cited supra). Irrespective of the submission made by the leaned counsel for the petitioner, he appealed to this Court, if an opportunity is given to the petitioner to recall P.W.1 to P.W.6, he would cross examine them on the same day.

8. It is no doubt true that the trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons and that, the duty of the court is to see that not only the interest of the accused as per law is protected, but also the societal and collective interest is safeguarded. In the said case cited on the side of the respondent, the cross examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics. Therefore, the Hon'ble Supreme Court has observed that such a long time for cross examination of the witness is anathema to the concept of proper and fair trial.

9. Unlike in the present case, PW.1 to PW.4 and PW.5 and PW.6 were examined in chief on 26.05.2016 and 26.09.2016 and Section 311 Cr.P.C petition was filed by the petitioner on 01.11.2016. Hence, this Court is of the view that there is no undue delay on the side of the petitioner in approaching the court, as alleged by the respondent and the decision cited on the side of the respondent is not applicable to the facts of the present case. Apart from that, in order to give one more opportunity to the petitioner, this Court is inclined to set aside the order impugned herein, of-course, imposing cost on the petitioner.

10. In the result, this Criminal Original Petition is ordered in the following terms:

(i) The order of the learned Sessions Judge, Fast Track Mahila Court, Namakkal made in Cr.M.P.No.543 of 2016 in Special CC No.44 of 2015 dated 10.11.2016 is set aside.

(ii)The petitioner is directed to pay a sum of Rs.3,000/- to the defacto complainant within a period of two weeks from the date of receipt of a copy of this order.

(iii)On such payment and upon production of receipt for the same, the petitioner is permitted to recall PW1 to PW6 for cross examination.

(iv)The cross examination of those witnesses shall be completed on the same day itself.

Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Fast Track Mahila Court, Namakkal.
2. The Inspector of Police,
Rasipuram Police Station,
Namakkal District.
3. The Public Prosecutor, High Court, Madras-104.

KGK(CO)
RS(20/01/2017)

Cr1.O.P.No.26689 of 2016

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